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ALBERT H. KRITZER, THE 1980 UN CONVENTION (CISG), AND THE VIS MOOT: AN INSEPARABLE RELATIONSHIP

Luiz Gustavo Meira Moser*

Albert H. Kritzer left the international legal community on June 1, 2010, having passed on an immense legacy as a result of successful projects well ahead of his time: the work of a man fortunate enough to ally wisdom and courage with the joy of living.

ALBERT KRITZER: THE IDEALIST

Professor Kritzer was one of the creators of the Willem C. Vis International Commercial Arbitration Moot,¹ the biggest competition of international arbitration in the world, held annually in Vienna, Austria. The Vis Moot,² as it is popularly known, is a simulation of an arbitral tribunal in which law students act as counsel before arbitrators, the judges of real cases, who evaluate the students during oral arguments.³ The Vis is conducted in English and involves the study and application of the 1980 Vienna Convention on the

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¹ *Remembering our Colleague Professor Albert H. Kritzer*, INST. INT’L COM. L., http://www.cisg.law.pace.edu/cisg/Albert_Kritzer.html (last visited Jan. 15, 2012) [hereinafter *Remembering our College*].

² See BLACK’S LAW DICTIONARY 465 (3d ed. 2006) (defining the term as a fictitious court held usually in law schools to argue hypothetical cases, especially at the appellate level).

³ *The Annual Willem C. Vis International Commercial Arbitration Moot*, PACE L. SCH., <http://cisgw3.law.pace.edu/vis.html> (last visited Jan. 15, 2012) [hereinafter *The Annual Willem C. Vis*].

International Sale of Goods (“CISG”).⁴

The CISG is the most important outcome of an international effort to standardize the rules of private law in a particular sector. In this sense, the CISG provides justification for its creation: the regulation of a new international order involving the sale of international goods.

In order to promote uniformity in this area of law, the CISG was created under the auspices of the United Nations Commission on International Trade Law (“UNCITRAL”).⁵ Inspired by *lex mercatoria*, the CISG regulates international trade, but is not restricted by *lex mercatoria* principles.⁶ The CISG extracts models of civil law and common law elements capable of harmonizing trade between countries of different legal traditions.⁷

Although widely considered a negative aspect, the so-called

⁴ General Information, Link from *The Annual Willem C. Vis International Commercial Arbitration Moot*, PACE L. SCH., <http://cisgw3.law.pace.edu/cisg/moot/inform.html>.

⁵ See 1980-United Nations Convention on Contracts for the International Sale of Goods, UNITED NATIONS COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG.html (last visited Jan. 15, 2012) (showing that UNCITRAL is the United Nations body responsible for drafting model laws for the standardization and /or harmonization of international trade).

⁶ See FRANCESCO GALGANO, *LEX MERCATORIA* (2001); Philippe Kahn, *General Principles of Rights Before Arbitrators of International Commerce*, 116 J. INT’L RTS. 305 (1989); Berthold Goldman, *Frontiers of Law and Lex Mercatoria*, 9 ARCHIVES PHIL. L. 177 (1964); Fabrizio Marrella, *Lex Mercatoria and UNIDROIT Principles: For a Systematic Reconstructed of International Trade Law*, 5 CONT. & BUS. EUR. 29 (2000); Bruno Oppetit, *The Concept of Source of Law and International Trade Law*, 27 ARCHIVES PHIL. L. 43 (1982); Bruno Oppetit, *Around the International Contract*, 12 RTS. J. FRENCH LEGAL THEORY 107 (1990); Franco Ferrari, *The Importance of the Uses in the Vienna Convention on the Sale of Goods Internazionale Mobilli*, 1 CONT. & BUS. 239 (1994).

⁷ See PETER SCHLECHTRIEM & CLAUDE WITZ, *CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES* [VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS] (2008); PETER SCHLECHTRIEM & INGEBORG SCHWENZER, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* (Ingeborg Schwenzler ed., 2005); Claude Samson, *L’harmonisation du droit de la vente internationale de marchandises entre pays de droit civil et pays de common law* [The Harmonization of the Law of the International Sale of Goods Between Civil Law and Common Law Countries], in *CONTEMPORARY LAW: CANADIAN REPORTS TO THE 1990 INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 100 (1990).

crisis of private international law,⁸ which is associated with the CISG's harmonization process, represents the positive emergence of a new way of thinking about international private law. This new way of thinking considers the effect of globalization and economic integration as progressive, by seeking legal approximation between the most varied cultures.

While it is true that regulating contracts between countries from different legal cultures is difficult because of the varying rules of private international law and distinct forms of international conflict resolution in each country, apart from the cultural and linguistic aspects, for those states that have adopted the CISG, there is a uniform law on the international sale of goods that reduces to a great extent the transaction costs resulting from uncertainty as to whether the CISG is applicable to the dispute or the possible choice of law, given the potential battle over the choice of private international law rules.⁹

In this regard, it is worth noting that a national law cannot sufficiently reduce the transaction costs of international contracts given the difference between the rules that govern

⁸ See Véra Fradera, *A saga da uniformização da compra e venda internacional: da lex mercatoria à Convenção de Viena de 1980* [*The Saga of Uniformity in the International Sale of Goods: From Lex Mercatoria to the Vienna Convention of 1980*], in O DIREITO INTERNACIONAL E O DIREITO BRASILEIRO: HOMENAGEM A JOSÉ FRANCISCO REZEK [INTERNATIONAL LAW AND BRAZILIAN LAW: HOMAGE TO JOSÉ FRANCISCO REZEK] 809 (2004); Ole Lando, *The Law Applicable to the Merits of the Dispute*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 101 (Julien D.M. Lew ed., 1987).

⁹ See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH L. REV. 216, 250 (1990); see also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 608 (2003) (noting that transaction costs reflect the burden that parties experience when they use the market, e.g., costs incurred in negotiating, drafting and enforcing a contract). One of the most intricate concerns relative to such costs relate to the amounts spent on negotiating, predicting behavior, choice of partners, preparation, and management of agreements. Included in this equation are the efforts to look for the goods in the market, the comparative analysis of price and quality desired, the compliance by or of due performance guarantees that the party will require in any default, and the drafting of contractual instruments that outline clearly the rights, duties, and obligations of the parties. *Id.* at 562–68. Legal measures, when considered inevitable to satisfy the claim, enter into this equation. *Id.* at 565–68. Of course, uncertainties are translated into transaction costs. The greater the uncertainty with regard to a successful transaction coveted by contractors, the higher the costs. *Id.* at 563–65.

the particular matter in different States. Thus, if the rules of contract formation are different in Brazil and the United States, the parties cannot rely on a common body of rules to govern the contract. They will have to bargain, thereby increasing the transaction costs. This is why harmonization of rules relative to substantive law, at least for international transactions, is a highly positive response for the market as a whole.

In this context, the CISG meets two key requirements that are requisite for any body of rules drafted to reduce transaction costs: on one hand, it recognizes the principle of freedom of contract to a great extent¹⁰ and, on the other hand, it brings a body of law that, although not perfect, establishes a sort of compromise between the two legal families: civil law and common law, thereby creating a neutral body of rules.¹¹

Moreover, the use of arbitration as a means of resolving disputes relating to contracts for the international sale of goods is a powerful ally to uniform rules on international trade, as the arbitrators eventually settle disputes in a harmonious manner. In addition, the use of arbitration in disputes relating to contracts for the international sale of goods leads to the formation of a profitable and interesting arbitral case law and a deepened knowledge of the intricacies of the CISG.¹²

¹⁰ United Nations Convention on Contracts for the International Sale of Goods art. 6, *adopted* Apr. 11, 1980, 1489 U.N.T.S. 3 (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

¹¹ See generally L.B. Timm & Luiz Gustavo Meira Moser, *Aplicação da CISG no Brasil: possibilidade jurídicas e incentivos econômicos* [Application of the CISG in Brazil: Legal Possibilities and Economic Incentives], in *ARBITRAGEM INTERNACIONAL* [INTERNATIONAL ARBITRATION] 265 (2010).

¹² See Steven Shavell, *Economic Analysis of Contract Law* 22 (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 403, 2003), available at <http://ssrn.com/abstract=382040> (intimating that arbitration has been considered as the most efficient out-of-court dispute resolution method worldwide, inasmuch as, apart from the expertise of the decision-maker, who has practical experience in the business environment, there is flexibility of rules—procedural and substantive—covered or not by confidentiality, and the parties have the opportunity to anticipate the cost of the contract). Cost savings may come also from the fact that there is generally no appeal on issues of fact or law. Private methods of conflict resolution may be preferred not only because they are faster—or ought to be—vis-à-vis court litigation, but also because the arbitrators are more prepared to interpret the facts and resolve the matter in dispute: the parties give the arbitration panel

ALBERT KRITZER: A YOUNG TEACHER UNTIL THE END OF HIS DAYS

As Associate Professor at Pace University School of Law, founder of the Institute of International Commercial Law, and member of the CISG Advisory Council, Professor Kritzer created the autonomous network of CISG websites as well as the CISG database,¹³ the latter being the most successful of his projects.

Motivated and endowed with a fascinating joy for life, Professor Kritzer, the tireless student of the uniform law, fought valiantly to promote the harmonization of international trade rules, exerting the same energy as when he defended his country in the armed forces during the Korean War. At eighty two, he worked seven days a week and twelve hours a day, most of which he employed in the study of the CISG and related projects, including efforts to achieve what he desired most: the harmonization of international trade rules and uniform interpretation.

Among Kritzer's most recent projects, the database on the CISG and International Commercial Law deserve special attention. The database compiles international doctrine and commentary on timely issues relating to the CISG and the uniform international sales law.¹⁴ Moreover, it archives judicial and arbitration decisions collected in approximately seventy countries where disputes arising from contracts for the international sale of goods have resulted in an application of the CISG, making these decisions, notably, available in English.¹⁵

Another of Kritzer's initiatives was the creation of the

considerable discretion to design the process; the arbitrator, who is familiar with business negotiations and complex commercial disputes, should therefore develop and implement the framework for the resolution and, whenever possible, encourage the parties to resolve the dispute by settlement. In this line of thought, according to Shavell, arbitration is an example of a "private adjudication" mechanism that reduces the transaction costs since it provides broader access to the contractual information vis-à-vis court litigation, apart from the expertise of the arbitrator and the flexibility of the rules. *Id.*

¹³ *Remembering our Colleague*, *supra* note 1.

¹⁴ *Albert H. Kritzer GISG Database*, PACE L. SCH. INST. INT'L COM. L., <http://www.cisg.law.pace.edu/> (last updated July 25, 2011).

¹⁵ *Id.*

Clive M. Schmitthoff Student Essay Competition, a prestigious competition of papers focusing on topics involving the CISG, UNIDROIT, and PECL.¹⁶ Kritzer was also involved in the Queen Mary Translation Programme, the Global Consumer Law Forum, the International Law Project, and the Global online dispute resolution project.

I began my collaboration with the CISG database project in 2007 by working with judicial decisions from Spanish, Swiss, and French courts. At the time, I lamented the absence of Brazilian case law, since Brazil was not, and is still not, a signatory to the CISG.¹⁷ Professor Kritzer, through his caring words of wisdom, encouraged me to study the uniform law, asserting that ratification would soon occur.

In 2008, I had the fortunate opportunity to translate some national decisions in which the CISG was mentioned for the Brazilian Restatement of Law No. 169, proposed by Professor Véra Jacob Fradera.¹⁸ Recently, Brazilian courts have shown increasing sympathy towards the influence of the CISG in domestic law.¹⁹ New editions of Brazilian Restatements, brought about through the influence of international commercial law, have been applied in judicial practice.²⁰ It is

¹⁶ *Institute of International Commercial Law*, PACE L. SCH., <http://www.cisg.law.pace.edu/cisg/text/essay.html> (last visited Jan. 24, 2012).

¹⁷ See generally VÉRA JACOB DE FRADERA & LUIZ GUSTAVO MEIRA MOSER, A COMPRA E VENDA INTERNACIONAL DE MERCADORIAS: ESTUDOS SOBRE A CONVENÇÃO DE VIENA DE 1980 [THE INTERNATIONAL SALE OF GOODS: STUDIES ON THE VIENNA CONVENTION OF 1980] (2010) (discussing the CISG and its interactions with Brazilian law).

¹⁸ See T.J.R.G.S., Ap. Civ. No. 70025609579, Relator: Umberto Guaspari Sudbrack et. al, 20.4.2009 (Braz.), available at <http://cisgw3.law.pace.edu/cases/090520b5.html>.

¹⁹ See T.J.S.P., Ap. Civ. No. 1.179.013-1, Relator: Coutinho de Arruda et. al, 03.07.2007 (Braz.), available at <http://cisgw3.law.pace.edu/cases/070703b5.html>; T.J.S.P., Ap. Civ. No. 379.981-4/0, Relator: Enio Zuliana et. al, 24.04.2008 (Braz.), available at <http://cisgw3.law.pace.edu/cases/080424b5.html>; T.J.R.G.S., Ap. Civ. No. 70025609579, Relator: Umberto Guaspari Sudbrack et. al, 20.05.2009 (Braz.), available at <http://cisgw3.law.pace.edu/cases/090520b5.html>.

²⁰ Apart from the Restatement of Law No. 169, the Restatement of Law No. 409, also proposed by Prof. Véra Jacob Fradera—which states that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves under the influence of Art. 9 of the CISG—has recently come into force in Brazil. See RESTATEMENT OF LAW No. 169 (Braz.), available at <http://daeth.cjf.jus.br/revista/enunciados/IIIJornada.pdf>; RESTATEMENT OF LAW No. 409 (Braz.),

worth noting that the study and interpretive analysis of the uniform law, as well as the jurisprudence of international courts and international arbitrations, can serve as the parameters for the interpretation and application of Articles 111, 113, and 422 of the Brazilian Civil Code of 2002.²¹

ALBERT KRITZER: THE MAN

From a plural, legal, and cultural perspective, the CISG database has received the approval of many scholars and boasts a curriculum of more than 2,500 decisions translated into English.²² An inexhaustible source for research, the network serves as a consultative body for judicial decisions involving issues posed by the CISG.²³

Professor Kritzer always challenged his students with difficult GISG cases and guided them both as a mentor and friend. I always admired Professor Kritzer's unrestrained passion for the CISG database. Following his motto: "tame the dragon," Professor Kritzer worked closely with CISG participants and, whenever possible, offered suggestions and comments. He created the final edition by himself, in form and figure, without pomp and circumstance.

As evidence of the success of Professor Kritzer's idea, the Vis Moot, based on CISG research, is in its nineteenth year and continues to take place at the headquarters of UNCITRAL in Vienna, Austria.²⁴ In 2010, 255 teams participated in the event, representing approximately 70 countries.²⁵ Today, it can be said without exaggeration that the Vis Moot is the world cup for the law student interested in private international law.

At the Vis Moot, we all had the special pleasure of talking to Professor Kritzer during the oral hearings in Vienna. After the "mooties" were taken by the euphoria of post-pleading,

available at <http://www.jf.jus.br/cjf/cej-publ/Compilacao%20enunciados%20aprovados1.pdf>.

²¹ See JACOB DE FRADERA & MOSER, *supra* note 17 (discussing the CISG and its interactions with Brazilian law).

²² Albert H. Kritzer *GISG Database*, *supra* note 14.

²³ THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEM 5 (Franco Ferrari ed., 2008).

²⁴ *The Annual Willem C. Vis*, *supra* note 3.

²⁵ 2010 Competition, PACE L. SCH., <http://www.pace.edu/school-of-law/nod/e/166> (last visited Jan. 15, 2012).

many of them were curious to hear about their performances and, sometimes, felt trapped by feelings of frustration caused by the intensity of the competition.

During these anxious moments, Professor Kritzer was always there, ready to welcome them. His calm and steady voice, along with his peace of mind and kindness, offered hope and consolation to the students. Professor Kritzer seemed willing to share his extraordinary knowledge not only about the CISG and the Vis Moot, but his life experiences as a student, teacher, and lawyer.

The last time we spoke, in April 2010, I introduced Professor Kritzer to my Vis Moot team, UFRGS,²⁶ and said: "Professor Kritzer, please tell my boys the history of the Vis Moot. They need to know about this outstanding project, celebrated worldwide." Professor Kritzer replied, shot with a mix of joy and deep satisfaction: "boys, you will not believe, we began the Vis Moot with 11 teams. We thought it would be an utter failure and, today, we have over 250!"

These words reflect the way Professor Kritzer felt about his achievements. He was a man far ahead of his time, who knew how to hit a hidden target accurately, handle success effectively, and perpetuate a good example.

In late May 2010, Professor Kritzer was in Sao Paulo participating with his Vis Moots colleague, Professor E. Bergsten, in a major event sponsored by FIESP and GV concerning arbitration and CISG issues. On that occasion, Professor Kritzer showed his youthful attitude to life, trying to discover our country and our culture in all its aspects, including the Carnival, which drew his curiosity a great deal. Professor Kritzer promised that his next visit to Brazil would be in February so as not to miss our biggest party.

The international legal community has lost an exceptional human being, a renowned teacher, and a tireless scholar. Albert H. Kritzer has left behind an immense legacy and will always be remembered.

²⁶ Federal University of Rio Grande do Sul, Brazil.